U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 15 December 2006*In the Matter of*

J. E. R.
Claimant
v.

PEABODY COAL COMPANY,
Employer

Case No. 2006-BLA-5062

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:[1]
Brent Younts, Esquire
Claimant
Philip J. Reverman, Esquire
For the Employer

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

AWARD OF BENEFITS

This proceeding arises from a request for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act and the pertinent regulations, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing requested by the Employer August 1, 2005. Director's Exhibit ("DX") 23.

Claimant was last employed in coal mine work in the state of Kentucky, the law of the United States Court of Appeals for the Sixth Circuit controls. See ***Shupe v. Director, OWCP***, 12 BLR 1-200, 1-202 (1989)(en banc). Since Claimant filed this application for benefits after January 1, 1982, Part 718 applies.

The Claimant filed this application on October 25, 2004. DX 2. A hearing was held in Owensboro Kentucky on September 26, 2006. 28 Director's Exhibits (DX 1-DX 28) were admitted into the record for identification. See transcript, "TR" 5. Two Claimant's Exhibits ("CX" 1- CX 2, TR 10) and two Employer's exhibits ("EX" 1 – EX 2, TR 20-30) were also

[1] The Director, Office of Workers' Compensation Programs, was not present nor represented by counsel at the hearing.

admitted. Subsequently, the record remained open for further development regarding rebuttal of CX 2, a reading of a June 30, 2006 x-ray interpreted by Dr. Rasmussen. TR 31. On October 16, I received proposed EX 3. On October 23, this Office received proposed CX 3. Both were exchanged and neither party entered any objection.

Briefs were submitted by both the Claimant and Employer.

The Claimant testified that he is 61 years of age and that he has a tenth grade education. He is married 23 years. He worked for Peabody Coal for 24 years. TR 11.

The Claimant worked primarily as a ventilation and brattice man, who built concrete stoppings for air shafts, and hung curtains, and this work required lifting of blocks weighing up to 60 pounds, and required him to stoop and crawl to perform his work, often at the face of the coal, in the dustiest part of the mine. Id 13-15. He would be black from coal dust at the end of the day. Id. 15. He also drove a shuttle car, and was a roof bolter. Id. He worked without protection of his nose and mouth from the dust. Id.

The dust permeated his system and he would cough and spit it up. Id. 16. He continues to spit up, intermittently. He coughs and brings up a clear mucous about two or three times a week. Id. 16-17. He also has a dry cough daily, mostly at night, at three or four minutes a time. Id. 18. He is often short of breath, often without exertion. Id. 18-19. Walking brings it on. He can not walk two blocks at a time, and can not climb steps. Id. 19-20.

The Claimant testified that he can lift to 40 pounds occasionally, but could not lift 10 pounds comfortably if he had to carry it. Id. 21-22. He spends most of his time at home, often in a recliner. He often has to sleep in the recliner because lying in bed often produces shortness of breath. Id. 21-23.

The Claimant was involved in an accident in 2005 when he injured his back and legs and has problems from that. Id. 24, 27. He had polio as a child and once weighed between 275 and 280 pounds but lost about 40 pounds, when he was examined, but now weighs about 290 pounds. Id. 24-26. He takes medication for high blood pressure and high cholesterol, medications for a liver disorder. Id. 26. As a miner he had a knee injury that kept him from work. Id. 27.

At one time the Claimant smoked cigarettes but quit in 1984. Id. 28.

The Claimant receives Social Security disability benefits and is currently drawing more than $1,500.00 per month, and receives a miner's pension of $837.75 per month. TR 24 -25.

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir. 1989).

This case represents an initial claim for benefits. To receive black lung disability benefits under the Act, a miner must prove that (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) his total disability is caused by pneumoconiosis. ***Gee v. W.G. Moore and Sons***, 9 B.L.R. 1-4 (1986) (en banc); ***Baumgartner v. Director***, OWCP, 9 B.L.R. 1-65 (1986) (en banc). ***See Mullins Coal Co., Inc. of Virginia v. Director***, OWCP, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). The failure to prove any requisite element precludes a finding of entitlement. ***Anderson v. Valley Camp of Utah, Inc.***, 12 B.L.R. 1-111 (1989); ***Perry v. Director***, OWCP, 9 B.L.R. 1-1 (1986) 1-1 (1986) (en banc).

STIPULATIONS AND WITHDRAWAL OF ISSUES

1. The timeliness of the claim is no longer being contested. TR 5.

Timeliness is a jurisdictional matter that can not be waived. 30 U.S.C. § 932(f), provides that "[a]ny claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later": (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978. The Secretary of Labor's implementing regulations at 20 C.F.R. § 725.308 sets forth in part, as follows:

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

I have reviewed all of the evidence in the record and no evidence exists to rebut the presumption.

2. The Claimant is a "miner" as that term is defined by the Act, and has worked after 1969. TR 5.

3. The Employer agreed that the Claimant had 24 years of coal mine employment. TR 5.

4. Peabody Coal Company is the responsible operator. TR 5.

5. The Claimant has one dependent. TR 5.

After a review of the stipulations and the record, they are accepted.

REMAINING ISSUES

1. Whether the miner suffers from pneumoconiois.
2. If so, whether the miner's pneumoconiosis arose out of coal mine employment.
3. Whether the miner is totally disabled.
4. If so, whether the miner's disability is due to pneumoconiosis.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[2] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[3] The drafters of the APA used the term "burden of proof" to mean the burden

[2] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[3] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp. v. Director***, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the

of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[4]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

MEDICAL EVIDENCE SUMMARY

X-rays

Exhibit No.	Physician	BCR/BR	Date of film	Reading
DX 12	Westerfield	B	11/18/04	Negative[5]
EX 1	Repsher	B	6/7/05	Negative
CX 2	Rasmussen	B	6/30/06	1,0
EX 3	Wiot	B/BCR	"	Negative
CX 3	Baker	B	10/17/06	1,0

Pulmonary function studies

Exhibit No.	Physician	Date of study	Tracings present?	Flow-volume loop?	Broncho-dilator?	FEV1	FVC/ MVV	Coop. and Comp. Noted?
DX 12	Simpao	11/18/04	Yes		No	44% 35	49%	
EX 1	Repsher	6/7/05	Yes	Yes	Yes	1.45 1.12	2.36 1.81	Poor

Blood gas studies

Exhibit No.	Physician	Date of Study	Altitude	Resting (R) Exercise (E)	PCO2	PO2	Comments
EX 1	Repsher	6/7/05	0-2999	R	40.7	79	Normal

Medical Reports

Valentino Simpao, M.D.

Dr. Simpao, a Family Practitioner, conducted an examination of the Claimant on November 18, 2004 at the request of the Department of Labor. Although the chest x-ray taken as part of Dr. Simpao's examination was found to be "negative" for pneumoconiosis. DX 12. Dr.

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context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[4] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

[5] This x-ray was read for quality purposes only by Peter Barnett, M.D. a board certified B reader radiologist. DX 13.

Simpao found legal pneumoconiosis based upon physical findings, symptomotology, and pulmonary function testing . He noted a reduced vital capacity and flow volume curve, which indicates both a severe restrictive and severe obstructive airway disease. Id.

Lawrence Repsher, M.D.

Dr. Repsher, board certified in internal and pulmonary medicine, stated that, although the effort dependant pulmonary function testing done as part of his examination did not yield valid results, the relatively effort independent diffusing capacity testing was found to be "normal to supernormal" and, when combined with the normal arterial blood gas studies, would rule out the presence of any significant pulmonary impairment in the Claimant.

Gregory Fino, M.D.

Dr. Fino, also a board certified internist and pulmonologist, reviewed medical records for Employer. EX 2. Based upon his review of those records, Dr. Fino stated that there was a lack of any objective evidence of respiratory impairment in the Claimant. While the Claimant never gave a good effort on the spirometry testing, Dr. Fino stated that, when taking into consideration the alveolar volume, the normal diffusing capacity and the normal arterial blood gas studies, it was clear, from an objective standpoint, that there was no evidence of a respiratory impairment or pulmonary disease secondary to any pulmonary condition. Having found no objective evidence of any respiratory impairment, it was Dr. Fino's opinion that the Claimant was neither partially nor totally disabled from returning to his last coal mining job or a job requiring similar effort from a respiratory standpoint. Id.

"Other" Medical Evidence

Exhibit No.	Physician	Date of Medical Report	Type of Procedure	Comments
EX 1	Repsher	6/28/05	CT	No pneumoconiosis.
EX 2	Fino	8/16/06	CT	No pneumoconiosis.

FINDINGS OF FACT

Pneumoconiosis

Existence of Pneumoconiosis

Pneumoconiosis is defined as a chronic dust disease arising out of coal mine employment.[6] The regulatory definitions include both clinical (medical) pneumoconiosis, defined as diseases recognized by the medical community as pneumoconiosis, and legal pneumoconiosis, defined as any chronic lung disease. . .arising out of coal mine employment.[7] The regulation further indicates that a lung disease arising out of coal mine employment includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 718.201(b).

[6] 20 C.F.R § 718.201(a).
[7] 20 C.F.R. § 718.201(a)(1) and (2) (emphasis added).

As several courts have noted, the legal definition of pneumoconiosis is much broader than medical pneumoconiosis. ***Kline v. Director, OWCP***, 877 F.2d 1175 (3d Cir. 1989).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

X-ray Evidence

The record I consider under the rules for limitations on evidence involves five readings of four x-rays. The Claimant relies on the one reading by a board certified B reader, Dr. Wiot. EX 3. Three of the five x-rays were read as negative.

The weight I must attribute to the x-rays submitted for evaluation with the current application are in dispute. "[W]here two or more X-ray reports are in conflict…consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 718.202(a)(1). I am "not required to defer to…radiological experience or…status as a professor of radiology." ***Dempsey v. Sewell Coal Co***., 23 BLR 1-47 (2004).

I note that of the readers of record, Dr. Wiot is the best qualified.

I note that the preponderance of the readers do not find pneumoconiosis.

The Board has held that I am not required to defer to the numerical superiority of x-ray evidence, ***Wilt v. Wolverine Mining Co***., 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, ***Edmiston v. F & R Coal Co***., 14 B.L.R. 1-65 (1990). See also ***Schetroma v. Director, OWCP***, 18 B.L.R. 1- (1993) (use of numerical superiority upheld in weighing blood gas studies); ***Tokaricik v. Consolidation Coal Co***., 6 B.L.R. 1-666 (1984) (the judge properly assigned greater weight to the positive x-ray evidence of record, notwithstanding the fact that the majority of x-ray interpretations in the record, including all of the B-reader reports, were negative for existence of the disease). See also ***Woodward v. Director, OWCP***, 991 F.2d 314 (6th Cir. 1993).

In this case, the number of negative x-rays and expert opinion of the most qualified reader dictate a conclusion that pneumoconiosis has not been established by x-ray.

Biopsy and Presumption

Claimant has not established pneumoconiosis by the provisions of subsection 718.202(a)(2) since no biopsy evidence has been submitted into evidence.

Medical Reports

20 C.F.R. § 718.202(a)(4) sets forth:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

"Legal pneumoconiosis is a much broader category of disease" than medical pneumoconiosis, which is "a particular disease of the lung generally characterized by certain opacities appearing on a chest x-ray." ***Island Creek Coal Co. v. Compton***, 211 F.3d 203 at 210 (4th Cir. 2000). The burden is on the Claimant to prove that his coal-mine employment caused his lung disease. 20 C.F.R. § 718.201(a)(2). A disease "arising out of coal mine employment" is one that is significantly related to, or substantially aggravated by, coal dust exposure. 20 C.F.R. § 718.201(b). ***Cornett v. Benham Coal, Inc***., 227 F.3d 569, 576 (6th Cir. 2000).

Dr. Simpao is the Director of the Coal Miner's Clinic at the Muhlenberg Community Hospital and has been the Director since the early 1970's. The Clinic is under contract to make examinations to determine the presence or absence of pneumoconiosis and disability. He did not find clinical pneumoconiosis, but diagnosed legal coal workers' pneumoconiosis based upon his reasoned opinion and his diagnosis of pneumoconiosis is based upon pulmonary function tests, physical findings, spirometry, use of inhaler and the number of years in his occupational history, clinical findings and symptomotology of the Claimant. He noted the smoking history. Although he noted that the influence of smoking and coal dust could not be determined as to the degree of influence, pneumoconiosis was attributed as the primary cause of the Claimant's lung condition.

Both Dr. Repsher, who examined the Claimant, and Dr. Fino, who did not, render opinions that there is no respiratory deficit established on testing in this record. Both allege that the results obtained by Dr. Simpao are invalid.

Employer reminds me that Dr. Simpao commented that the Claimant's overweight condition could affect the pulmonary function test results, and that diffusing volume studies would be useful in evaluating the Claimant's airway disease. DX 12. When advised that a diffusing capacity had been done on the Claimant subsequent to his examination and had been found to be normal, Dr. Simpao commented that this result could have some effect on his opinions and findings of restrictive airway disease. CX 2 14-15.

Claimant emphasizes that Dr. Simpao states in response to question 39, page 9, CX 2 that being overweight could affect the forced vital capacity, which is on the restrictive side. He also indicates that normally it would not affect the FEV1 and his findings of severe in terms of his capacity for breathing would still stand, despite the Claimant being overweight. CX 2 at 9.

I note that the CT scans are negative, but I do not accord them any significant weight as to legal pneumoconiosis.

The Department of Labor had Dr. Simpao's results reviewed by R.V. Mettu. DX 12. They were found to be acceptable.

Comparing the examinations rendered by Dr. Simpao and Dr. Repsher, I note that Dr. Simpao did not report the spirometry in the suggested format, but he was deposed and subject to cross examination, explained that he did accurately note the FEV1. I also note that his testing is

supported by Mettu's evaluation, which I attribute significant weight. Dr. Repsher was unable to accurately review the data that he obtained.

After a review of all of the evidence, I attribute less weight to the opinions of Dr. Fino. He did not examine the Claimant and much of his reasoning derives from Dr. Repsher's findings. ***Cole v. East Kentucky Collieries***, 20 B.L.R. 1-51 (1996) (the administrative law judge acted within his discretion in according less weight to the opinions of the non-examining physicians; he gave their opinions less weight, but did not completely discredit them).

Although Dr. Simpao is not board certified and Dr. Repsher is, as the director of a Black Lung clinic, I find that he is qualified to diagnose black lung disease. Symptoms include wheezing, shortness of breath and coughing and tightness as well as ankle edema. Dr. Simpao notes that usually involves the lungs. The Claimant advises:

> He states at CX 2, question 17, page 5 that shortness of breath could be attributable to the inhalation of coal dust and at question 18, page 6 he notes the same symptoms expressed by the Claimant are symptoms expressed in individuals who experience coal workers' pneumoconiosis.
>
> As to causation of chest pain or tightness, difficulty in breathing for 2-3 years, Dr. Simpao states in response to question 23, page 6, that the inhalation of coal dust or pneumoconiosis could be the cause of those symptoms. Slightly cyanotic lips and nails, according to Dr. Simpao at question 24, page 6-7 indicates that there is some discoloration due to the accumulation of carbon dioxide and a low level of oxygen. As to causation, he states at line 5, page 7, that it could be connected with a lung problem.
>
> Continuing with the issue of lung problems at page 7, Dr. Simpao indicates that the Albuterol that the Claimant was taking. Dr. Simpao also indicates his awareness that Dr. Westerfield had found no pneumoconiosis on the X-ray that was taken. He makes a finding of pneumoconiosis, however, notwithstanding that X-ray in his report and as stated in his opinion.
>
> In responding to question 31, page 7, Dr. Simpao indicates on page 8, that the FEV1 of 44% is "a severe degree of obstructive airway disease." He notes, also, in response to question 4 that an FVC of 49 is also a significant number and also falls under the severe category.
>
> Explaining reduced vital capacity and flow volume curve, responding to question 36, Dr. Simpao indicates that he has impairment with regard to his breathing capacity and it is caused by his lung problems.
>
> As noted above, in his report and as he is questioned at question 38 about severe restrictive and obstructive airway disease, Dr. Simpao states on page 8 that these were the findings based upon his interpretation of the pulmonary function studies.

See Brief.

Dr. Repsher relies on his findings of diffusing capacity to determine that the Claimant has no breathing impairment. Diffusing capacity is not one of the required bases for evaluation. The pulmonary function study, also referred to as a ventilatory study or spirometry, measures obstruction in the airways of the lungs. The greater the resistance to the flow of air, the more severe any lung impairment. A pulmonary function study does not indicate the existence of pneumoconiosis; rather, it is utilized to measure the level of the miner's disability. The same is true with diffusion studies. A physician can make a reasoned medical judgment that a miner is totally disabled even "where pulmonary function tests and/or blood-gas studies are medically contraindicated." ***Cornett v. Benham Coal, Inc.***, 227 F.3d 569 (6th Cir. 2000).

When asked about the effect of a negative diffusing capacity test, Dr, Simpao admitted that it could rule out a restrictive disease. CX 2 at 15. However, I note that he had diagnosed both a restrictive and obstructive disease. DX 12.

I note that in cases involving CT scans, a predicate must be laid showing the validity of the scans. In ***Tapley v. Bethenergy Mines, Inc***., BRB No. 04-0790 BLA (May 26, 2005) (unpub.), the ALJ did not abuse his discretion in excluding CT-scan evidence proffered by the employer based on the employer's failure to demonstrate that the test was (1) medically acceptable, and (2) relevant to establishing or refuting the claimant's entitlement to benefits. In accepting the Director's position on this issue, the Board held that, because CT-scans are not covered by specific quality standards under the regulations, the proffering party bears the burden of demonstrating that the CT-scans were "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." See 20 C.F.R. § 718.107(b) (2004).

I note that a similar test was used in several case involving diffusing capacities. In ***Consolidation Coal v. OWCP*** (Wasson Consolidation Coal Co. v. Director, Office of Workers' 23 Fed.Appx. 114, (4th Cir.,2001) and in ***Mountain Clay, Inc. v. Spivey***, 172 Fed.Appx. 641 (6th Cir, 2006), the import of a normal diffusing capacity (rendered by Dr. Fino) was of no consequence. Although these are unreported cases, I do not attribute precedent to them, but I note that the party offering the evidence did not lay the predicate of validity. In ***Dante Coal Co. v. OWCP (Jones)***, 164 Fed.Appx. 338 (4th Cir. ,2006), an ALJ properly rejected Drs. Castle and Fino's assertions that if the Claimant were suffering from pneumoconiosis, he would manifest an abnormal diffusing capacity indicative of a fibrotic process, because fibrosis is not a required element of legal pneumoconiosis. However, in ***Ramey v. Kentucky Carbon Corp***. 89 F.3d 835 (Table), 1996 WL 221415 (C.A.6), an ALJ accepted an explanation regarding the negative import of a diffusing capacity evaluation.

Similarly, the reverse application was condemned in ***Martin v. Ligon Preparation Co***., 400 F.3d 302 (6th Cir. 2005).

After a review of the evidence, I find that Dr. Repsher did not significantly explain why such a test might be valid, especially since the Claimant was diagnosed with both a restrictive and an obstructive disease, and presented with a history of treatment for both. The need for further explanation is especially true where he found all of the other testing that he performed to be invalid. Therefore, I attribute less weight to his opinion.

I find that Dr. Simpao submitted a "reasoned medical opinion" that establishes that legal pneumoconiosis in more than a de minnimus factor in the Claimant's respiratory impairment. ***Grundy Mining Co. v. Director, OWCP [Flynn]***, 353 F.3d 467 (6th Cir. 2003), I agree with the Claimant that the testimony in the deposition adequately explains his reasoning.

CAUSATION

A miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 CFR 718.203(b). I have discounted the opinions of Drs Broudy and Fino, who do not accept a diagnosis of pneumoconiosis, which is contrary to the full weight of the evidence. ***Howard v. Martin County Coal Corp.***, 89 Fed.Appx. 487 (6th Cir., 2003, unpbl.). ["ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most." ***Scott v. Mason Coal Co***., 289 F.3d 263 (4th Cir. 2002)]. ***Tapley v. Bethenergy Mines, Inc***., BRB No. 04-0790 BLA (May 26, 2005) (unpub.). The record establishes 24 years of coal mine employment. I

credit the opinion of Dr. Simpao on this point. Therefore, I find that the miner's pneumoconiosis arose at least in part out of coal mine employment.

TOTAL DISABILITY

To receive black lung disability benefits under the Act, a claimant must establish total disability due to a respiratory impairment or pulmonary disease. If a coal miner suffers from complicated pneumoconiosis, there is an irrebuttable presumption of total disability. 20 C.F.R. §§ 718.204(b) and 718.304. If that presumption does not apply, then according to the provisions of 20 C.F.R. §§ 718.204(b)(1) and (2), in the absence of contrary evidence, total disability in a living miner's claim may be established by four methods: (i) pulmonary function tests; (ii) arterial blood-gas tests; (iii) a showing of cor pulmonale with right-sided, congestive heart failure; or (iv) a reasoned medical opinion demonstrating a coal miner, due to his pulmonary condition, is unable to return to his usual coal mine employment or engage in similar employment in the immediate area requiring similar skills.

The record does not contain sufficient evidence that Claimant has complicated pneumoconiosis and there is no evidence of cor pulmonale with right sided congestive heart failure. As a result, the Claimant must demonstrate total respiratory or pulmonary disability through pulmonary function tests, arterial blood-gas tests, or medical opinion.

I attribute Dr. Mettu's opinion some weight as to the validity of Dr. Simpao's testing. I accept that Claimant has established total respiratory disability. Although this is disputed by the Employer, I credit Dr. Simpao's finding that noted a reduced vital capacity and flow volume curve, which, according to competent expert testimony, indicates both a severe restrictive and severe obstructive airway disease. I accept the Claimant's testimony that his work required heavy lifting and requires significant stooping and crawling. I find that Claimant's testimony that he can lift to 40 pounds occasionally, but could not lift 10 pounds comfortably if he had to carry it. Id. 21-22 is credible. I find that the Claimant's respiratory medical profile precludes performance of his past relevant work.

I specifically discount the position of Dr. Fino and Dr. Repsher that there is no evidence of a respiratory impairment in this record.

Therefore, I find that the Claimant has established one of the criteria under 20 CFR § 725.309, total disability.

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

Claimant needs to establish that pneumoconiosis is a "substantially contributing cause" to his disability. A "substantially contributing cause" is one which has a material adverse effect on the miner's respiratory or pulmonary condition, or one which materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1). The Benefits Review Board has held that §718.204 places the burden on the claimant to establish total disability due to pneumoconiosis by a preponderance of the evidence. ***Baumgardner v. Director, OWCP***, 11 B.L.R. 1-135 (1986).

I give Dr. Mettu's opinion some weight as to the validity of Dr. Simpao's testing. I credit Dr. Simpao's reports and deposition testimony that establishes causation. Again, I discount Drs. Repsher's and Fino's opinions as poorly reasoned, as their opinions are contrary to my finding on pneumoconiosis. ***Cornett v. Benham Coal, Inc.***, 227 F.3d 569, 576 (6th Cir. 2000). I also reject their position that no respiratory deficit exists in this record.

Dr. Simpao notes that both smoking and pneumoconiosis significantly contributed to total disability. I accept the Claimant's testimony that his work required heavy lifting and requires significant stooping and crawling. I accept Dr. Simpao's finding that the Claimant has both severe restrictive and severe obstructive airway disease which are legal pneumoconiosis and which preclude past relevant work. Based on reasons more fully set forth above in the discussion of pneumoconiosis and total disability, I accept this premise.

Therefore, I find that pneumoconiosis was a substantial contributing cause to the miner's disability. 20 C.F.R. §718.204(c)(1).

ENTITLEMENT

I find that Claimant has established entitlement to benefits. Pursuant to 20 CFR §725.503, benefits are payable as of the month of onset of total disability and if the evidence does not establish the month of onset, benefits are payable beginning with the month during which the claim was filed.

The Claimant was evaluated by Dr. Simpao in November, 2004. DX 12. I accept the determination that the Claimant was totally disabled due to pneumoconiosis at that time, and it is reasonable to expect that he had the same symptoms when he applied on October 25, 2004.

Therefore, I find that benefits are payable as of the month during which Claimant filed the claim, October, 2004.

Attorney's Fees

No award of attorney's fees for services to the Claimant is made herein because no application has been received from counsel. A period of 30 days is hereby allowed for the Claimant's counsel to submit an application. ***Bankes v. Director***, 8 BLR 2-l (l985). The application must conform to 20 C.F.R. 725.365 and 725.366, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served shall have 10 days following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

ORDER

The claim for benefits filed by **J.E. R.** is hereby **GRANTED**. Augmentation benefits for one dependent is also granted.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. See 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. See 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. See 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).